Order

Michigan Supreme Court
Lansing, Michigan

January 24, 2025

167166

GREAT LAKES EYE INSTITUTE, PC,
Plaintiff/Counterdefendant-Appellant,

v

SC: 167166
COA: 361575
Saginaw CC: 08-002481-CK

DAVID B. KREBS, M.D.,
Defendant/Counterplaintiff-Appellee.

_____/

On order of the Court, the application for leave to appeal the March 14, 2024 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part II(B)(4) of the judgment of the Court of Appeals. The trial court in this case was free to consider "relevant factors" when determining the appropriate attorney fee award. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 282 (2016). As noted by Judge LETICA in her partial dissent, the trial court did not abuse its discretion in holding that the fact that defendant prevailed in this litigation based upon a false premise was a "relevant factor" when fashioning a fee award. *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2024 (Docket No. 361575) (LETICA, J., concurring in part and dissenting in part), p 4.

"The law-of-the-case doctrine is a judicially created, self-imposed restraint designed to promote consistency throughout the life of a lawsuit." *Rott v Rott*, 508 Mich 274, 286 (2021). "The law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power*.' " *Id*. at 287, quoting *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 (1991) (emphasis in *Rott*; some quotation marks and citations omitted). The application of the doctrine is limited to " 'legal question[s]' " and requires that underlying " 'facts remain materially the same.' " *Locricchio*, 438 Mich at 109, quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454 (1981). Further, where new evidence is presented, the law-of-the-case doctrine does not preclude a trial court on remand from revisiting a factual question underlying a legal determination. See *Mitchell v Reolds Farms Co*, 261 Mich 615, 617 (1933); *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 727-728 (1973). In this case, the law-of-the-case doctrine

prevented the lower courts from revisiting the judgment that was granted in defendant's favor. Because neither the trial court nor the Court of Appeals had previously made an attorney fee determination, however, the law-of-the-case doctrine did not preclude the trial court from considering newly introduced evidence to determine the appropriate attorney fee award.

Additionally, the "rule of mandate" "embodies the well-accepted principle in our jurisprudence that a lower court must strictly comply with, and may not exceed the scope of, a remand order." *Int'l Business Machines Corp v Dep't of Treasury*, 316 Mich App 346, 352 (2016). In this case, the trial court determined correctly that the rule of mandate prohibited it from granting plaintiff's motion to reinstate the original judgment. The rule of mandate did not, however, prohibit the trial court from making its finding. The Court of Appeals remanded the current matter to the trial court "to determine whether plaintiff is a successor to GLE's liabilities under the employment contract and whether plaintiff is liable for defendant's attorney fees under Section 18 of that contract." *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued January 9, 2018 (Docket No. 335405), p 6. Therefore, the trial court, on remand, was within its mandate to consider newly introduced evidence when considering the attorney fee issue because that evidence was dispositive of the mandate to determine "GLE's liabilities under the employment contract."

Accordingly, we VACATE the Court of Appeals' remand instructions, and we REINSTATE the trial court's judgment awarding defendant David B. Krebs, M.D., $0 in attorney fees. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

STATE OF MICHIGAN

COURT OF APPEALS

GREAT LAKES EYE INSTITUTE, PC,

Plaintiff/Counterdefendant-Appellee/ Cross-Appellant,

v

DAVID B. KREBS, M.D.,

Defendant/Counterplaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
March 14, 2024

No. 361575
Saginaw Circuit Court
LC No. 08-002481-CK

Before: HOOD, P.J., and LETICA and MALDONADO, JJ.

PER CURIAM.

Defendant/counterplaintiff, David B. Krebs, M.D., appeals by right the circuit court's order, after an evidentiary hearing, ruling that Krebs was the prevailing party in the contract action between the parties but that he should be awarded contractual attorney fees and costs of $0. Plaintiff/counterdefendant, Great Lakes Eye Institute, PC (GLEI), appeals by right the circuit court's order denying its motion to reinstate a previous judgment in its favor. We conclude that the circuit court abused its discretion by reducing Krebs's award of attorney fees to $0 after initially calculating it to be $227,273.48. In all other respects, we affirm.

I. BACKGROUND

Much of this case has been detailed in this Court's previous opinions in *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued February 1, 2011 (Docket Nos. 294627 and 294628) (*Krebs I*), *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2015 (Docket No. 320086) (*Krebs II*), and *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued January 1, 2018 (Docket No. 335405) (*Krebs III*). To summarize, Great Lakes Eye, PC (GLE) hired Krebs as an ophthalmologist, and his employment agreement contained a restrictive covenant providing that, after terminating his employment, he would not practice ophthalmology within a specified geographical area for two years. Krebs

violated the restrictive covenant, and the trial court ultimately awarded GLEI—GLE's successor—$511,517 in liquidated damages and $150,400 in attorney fees.

After the employment agreement was signed, GLE had transferred its assets to its sole owner, Dr. Farhad Shokoohi, who then transferred the assets to Shokoohi Eye Center, PC (SEC), which operated under the assumed name GLEI.[1] In a previous appeal, this Court held that these two blanket assignments were ineffective to transfer Krebs's employment agreement because the employment agreement was not an asset, and regardless, the employment agreement did not permit transfer to Dr. Shokoohi as an individual. *Krebs II*, unpub op at 2-4. This Court "reverse[d] the trial court's order granting GLEI's motion for summary disposition and remand[ed] for entry of an order granting summary disposition in favor of Krebs." *Id*. at 4.

The merits of the dispute having been resolved, the circuit court was then tasked with resolving the issue of attorney fees. Section 18 of the parties' employment contract contains a prevailing-party attorney fee provision:

> The prevailing party in any legal proceedings commenced to enforce this instrument, whether by arbitration or judicially, shall be entitled to an award of its costs including, but not limited to, reasonable attorneys' fees in addition to such other damages, if any, or other awards as may be appropriate.

Following this Court's remand, Krebs moved for attorney fees pursuant to Section 18 on the basis that he was the prevailing party. The trial court denied Krebs's motion, holding that it was barred by the law-of-the-case doctrine because GLEI was a third-party stranger to the employment agreement.

This Court vacated the trial court's decision and remanded for further proceedings. *Krebs III*, unpub op at 2. This Court opined that the previous ruling "rested on two holdings: (1) the employment agreement was not included in the agreement, and (2) any assignment breached the employment contract's provision against assignment." *Id*. at 4. The previous panel did not specifically determine whether Krebs could recover attorney fees. *Id*. The previous panel had determined the issue of GLEI's right to enforce provisions of the contract, not its liabilities as a successor to the contract. *Id*. This Court ordered the trial court "to determine whether plaintiff is a successor to GLE's liabilities under the employment contract and whether plaintiff is liable for defendant's attorney fees under Section 18 of that contract." *Id*. at 6.

After the most recent remand, Krebs moved for leave to file an amended counterclaim to assert his entitlement to attorney fees and costs as the prevailing party pursuant to Section 18 of the employment contract. The trial court denied the motion on the basis that an amendment would be unnecessary. The parties agreed to bifurcate the successor-liability and attorney fee portions of the proceeding. In response to a discovery request, in December 2019, GLEI produced an assignment of Krebs's employment agreement (known as Assignment 3, to distinguish it from the two blanket assignments), which provided as follows:

[1] SEC later amended its articles of incorporation to change its name to GLEI.

> GLE remises and releases to GLEI all of its right, title, and interest in Contract and upon execution of this assignment, GLE is released from all obligations and liabilities arising from Contract.

At the hearing regarding attorney fees, Krebs agreed that he had testified three times that the agreement contained his signature.[2]

Subsequently, GLEI moved to dismiss Krebs's motion for attorney fees and to reinstate the previous judgment in its favor. The trial court denied the motion on the basis that this Court had remanded for specific proceedings, and the rule of mandate precluded it from taking such an action on remand. Regardless, the trial court noted that GLEI had not demonstrated an entitlement to affirmative relief when the document had been in GLEI's possession but GLEI had not produced it. Ultimately, the trial court relied on Assignment 3 when determining that GLEI was a successor to GLE's liabilities pursuant to the employment agreement.

Following a hearing at which Krebs presented evidence of his attorney fees, the trial court found that Krebs had been the prevailing party pursuant to the employment agreement. It noted that Krebs had premised his entitlement to fees on being the prevailing party, and it rejected GLEI's argument that Krebs was not entitled to enforce the prevailing-party provision because Krebs had not counterclaimed for attorney fees pursuant to the contract. The court noted that Krebs had attempted to file an amended counterclaim to formally state a breach-of-contract claim against GLEI and to request that the court find GLEI liable for attorney fees under the employment agreement and that, despite having numerous opportunities to do so, GLEI had not previously raised the argument. The court ruled that, in the interests of fairness and justice, it would be required to at least reconsider its denial of Krebs's motion to amend his counterclaim. Rather than doing so, in the interests of judicial efficiency, the court decided to analyze the claim for attorney fees.

When determining the reasonableness of Krebs's attorney fees, the trial court undertook a detailed, thorough, and well-thought-out analysis of the evidence presented to it and arrived at a baseline figure of $227,273.48 on the basis of the reasonable hours spent and rates charged by Krebs's attorneys. It indicated that it had considered other factors that might serve to adjust the baseline figure up or down, but it had determined that they did not apply. However, the court decided that it was appropriate to consider an additional factor: specifically, that Krebs was the prevailing party because he had asserted that his employment agreement had not been effectively assigned to GLEI, but it had come to light during the proceedings that he had in fact signed a written assignment. The court questioned how it could award Krebs attorney fees as a prevailing party when he had prevailed on "a false premise" because he had actual or constructive knowledge that his premise was false because he had signed the agreement. The court determined that the

[2] We note that, while Krebs states in his brief that he left a signature stamp at GLEI, which may have been the source of the signature, he has not provided any citation to the record to support this fact, and we have been unable to verify it. Regardless, the trial court determined that his statements were not credible.

factor "wholly displace[d] considerations otherwise favoring an award" and reduced Krebs's award of attorney fees to $0.

II. DISCUSSION

A. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion the trial court's award of attorney fees and costs. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). The trial court abuses its discretion "when the trial court's decision is outside the range of reasonable and principled outcomes" or "when it makes an error of law." *Id.*

This Court reviews de novo questions of law. *Id.*

This Court reviews de novo the legal effects of contractual provisions. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012).

This Court also reviews de novo the trial court's compliance with the scope of a remand order. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

B. ATTORNEY FEES

1. PLEADINGS

Krebs argues that the trial court erroneously determined that he had not pleaded a claim for contractual attorney fees against GLEI when he sought attorney fees in his initial counterclaim and later attempted to amend his counterclaim to include a claim for attorney fees. When the party's argument does not address the basis of the trial court's ruling, this Court need not consider granting a party relief. *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015). In this case, the trial court decided that, by attempting to file an amended counterclaim to formally state a claim for breach of contract against GLEI, Krebs had in fact attempted to pursue a claim for attorney fees under the employment agreement. It further decided that, rather than addressing whether it should have granted his motion to amend, it would be more judicially efficient to simply address his claim for attorney fees. The trial did not rule against Krebs on this basis, so we decline to address an error that did not occur.

Moreover, to the extent that GLEI argues that the trial court erred by considering Krebs's claim for attorney fees because he did not plead a contractual claim that would justify the award of fees, we disagree. To be entitled to contractual attorney fees, a party "must sue to enforce the fee-shifting provision, as it would for any other contractual term." *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194; 874 NW2d 367 (2015). The trial court's ruling was entirely consistent with *Pransky*. The trial court in fact ruled that Krebs was required to assert such a claim, but again,

considering Krebs's attempt to amend his counterclaim, it simply treated the issue as if it had granted his motion to amend and proceeded accordingly.[3]

2. STATUTE OF LIMITATIONS

We disagree with GLEI that Krebs's claim necessarily would have been barred by the statute of limitations. A party must bring a breach-of-contract claim within six years of when the claim accrues. MCL 600.5807(1), (9). A claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. In *Pransky*, 311 Mich App at 195, this Court recognized the possibility that a claim for contractual attorney fees may not accrue until after the party prevailed but declined to address whether a party would be barred from subsequently seeking to recover contractual attorney fees after prevailing in the original action. In this case, Krebs was not the prevailing party until after the trial court granted summary disposition in his favor, so his claim for prevailing-party attorney fees did not accrue until then. Therefore, the claim was not barred by the statute of limitations. Krebs was not required to preemptively seek attorney fees before becoming the prevailing party.[4]

3. APPLICABILITY OF *PIRGU* ANALYSIS

Krebs argues that the trial court should not have applied *Pirgu*, 499 Mich 269, to this case because *Pirgu* involved the reasonableness of attorney fees awarded by statute or court rule, but this case involves a contractual fee-shifting provision. We disagree because the language of the parties' contract provides for reasonable attorney fees, and there is no reason not to apply *Pirgu* in the context of the contractual fee-shifting provision at issue in this case.

Pursuant to the "American rule," generally, each party is responsible for the party's own attorney fees and costs. *Pransky*, 311 Mich App at 193-194. However, parties may contractually agree to provisions regarding attorney fees which are enforced like any other contractual term. *Id.* at 194. In this case, the parties' contract provides that the prevailing party in litigation to enforce the employment agreement shall be entitled to "reasonable attorneys' fees" and other damages. In *Pirgu*, 499 Mich at 278, the Michigan Supreme Court set out the framework that applies when a fee-shifting statute or court rule requires a trial court to determine a reasonable amount of attorney fees. The Michigan Supreme Court distilled the various factors and considerations from *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), and MRPC 1.5(a) into a single list to assist courts with determining the reasonableness of attorney fees. *Pirgu*, 499 Mich at 281. This Court has applied the *Smith* framework when reviewing the reasonableness of contractual attorney fees. See *Lakeside Retreats LLC v Camp No Counselors LLC*, 340 Mich App 79, 91-92; 985 NW2d 225 (2022). Because

[3] We note that a trial court has broad discretion to correct mistakes in the interests of judicial economy, and if a court "want[s] to give a second chance to a motion it . . . previously denied, it has every right to do so." *In re Estate of Moukalled*, 269 Mich App 708, 714; 714 NW2d 400 (2006) (quotation marks and citations omitted).

[4] For the same reason, we disagree with GLEI's arguments that Krebs's attempt to seek contractual attorney fees was unduly delayed or futile.

Pirgu folded *Smith* into its framework, and *Smith* has been applied to contractual attorney-fee cases, there is no reason to conclude that the trial court committed a general legal error by applying *Pirgu* in a case involving contractual attorney fees.

Nor is there a specific basis under the parties' contract that would indicate that the trial court should not have applied the *Pirgu* framework. Whether the *Pirgu* framework applies in a specific context depends on the language of the statute or court rule—or, in this case, the contract—at issue. *Pirgu*, 499 Mich at 278. The parties' contract provides that the prevailing party is entitled to "reasonable attorneys' fees." The contract offers no greater specificity, and nothing in the contractual language indicates that a nonstandard framework to determine the reasonableness of attorney fees should apply.

Using this framework, to arrive at an award of reasonable attorney fees, the trial court must first determine the reasonable hourly rate customarily charged in the locality for similar services. *Pirgu*, 499 Mich at 281. It must then multiply that rate by the hours expended on the case "to arrive at a baseline" figure. *Id*. In this case, the court ultimately arrived at a baseline figure of $227,273.48 in attorney fees, and the parties do not contest the propriety of this figure on appeal. After arriving at the baseline figure, the court must then "determine whether an up or down adjustment is appropriate" by considering eight specified factors. *Pirgu*, 499 Mich at 281. "[T]he trial court may consider any additional relevant factors," but it should "justify the relevance and use of any additional factors." *Id*. at 282. In this case, the trial court then considered Assignment 3 as an additional factor and adjusted the award to $0. As we discuss in Section II.B.4, *infra*, we disagree with this application of *Pirgu*, but it was appropriate for the court to apply its factors.

For these reasons, the trial court did not err by conducting a *Pirgu* analysis.

4. LAW-OF-THE-CASE DOCTRINE

While it was appropriate to consider the *Pirgu* factors, the trial court abused its discretion by using the "additional relevant factors" prong of its *Pirgu* analysis as a backdoor method of relitigating the issue of whether Krebs's employment contract had been assigned to GLEI.

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91; 662 NW2d 387 (2003) (quotation marks and citation omitted). This "is a judicially created, self-imposed restraint designed to promote consistency throughout the life of a lawsuit." *Rott v Rott*, 508 Mich 274, 286; 972 NW2d 789 (2021). The aim of this doctrine is "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id*. at 286-287 (quotation marks and citation omitted). "[T]he doctrine applies only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Id*. at 287 (quotation marks, citation, and emphasis omitted).

The law of this case, as decided in *Krebs II*, is that "GLE did not assign Krebs's employment contract to GLEI." *Krebs II*, unpub op at 5. For years the driving question in this lawsuit was whether Krebs's contract had been assigned to GLEI, and in *Krebs II*, this Court decided once and for all that the answer to that question was *no*. The only value offered by Assignment 3 was to establish that, contrary to this Court's holding in *Krebs II*, the contract

actually had been assigned to GLEI. Similar to Krebs, we are perplexed by the sudden emergence, at the final stages of these proceedings, of this document that has supposedly been in GLEI's possession since before the litigation began. However, that does not matter because it is too late. This question has been settled, and GLEI's attempt to relitigate this closed question is exactly the sort of tactic that the law-of-the-case doctrine was constructed to foreclose. See *Id*. at 286-287.

We are not convinced by the trial court's characterization of this issue as an additional factor to consider in its *Pirgu* analysis that it is anything other than the relitigation of a closed issue. As discussed in Section II.B.3, *supra*, when trial courts are assessing the reasonableness of attorney fees, they are free to consider "any additional relevant factors." *Pirgu*, 499 Mich at 282. In its order, the trial court had the following to say about the existence of additional factors:

> However, as indicated before the evidentiary hearing began, there is another factor to be considered. Specifically, facing enforcement of a restrictive covenant contained in his 1999 employment agreement with GLE, Krebs successfully asserted the absence of an effective assignment to GLEI. However, it is now known that there is, in fact, a written assignment of the employment agreement by GLE directly to GLEI, so-called "Assignment 3"; moreover, an assignment that Krebs knew about because he himself signed it to express his consent and his acknowledgment and agreement that GLEI shall have the full rights under the contract as previously held by GLE.
>
> Accordingly, prior to commencing the hearing, the court mused, "Under the circumstances, I question how I can reward Krebs with reimbursement of prevailing party attorney fees when his success is founded on a false premise. A premise that he had knowledge, actual or constructive, was false."
>
> The court has heard nothing in the course of the hearing, or read any written argument, that dissuades it from considering this additional factor. Moreover, there's been no persuasive argument that this factor shouldn't wholly displace considerations otherwise favoring an award. [Quotation marks, citations, alterations, and footnote omitted.]

The "false premise" upon which Krebs prevailed was that the contract was not assigned to GLEI. However, pursuant to *Krebs II*, the law of the case is that this premise is true; the contract was not assigned to GLEI. The trial court's consideration of Assignment 3 as an additional factor pursuant to *Pirgu* was a backdoor attempt to relitigate an issue that has already been resolved. The law-of-the-case doctrine and the interests of maintaining consistency and avoiding reconsideration of matters already decided instruct us that this decision cannot stand.

Therefore, we reverse the trial court's decision to reduce the award of attorney fees to $0 because this ran afoul of the law-of-the-case doctrine.

5. BANKRUPTCY FEES

Krebs argues that the trial court erred by denying fees accrued for bankruptcy proceedings that were commenced to prevent assets from being seized by GLEI while the circuit's decision to grant summary disposition in GLEI's favor was being appealed. We disagree.

When interpreting contractual language, this Court considers the contractual language as a whole. *Skanska USA Bldg Inc v MAP Mech Contractors, Inc*, 505 Mich 368, 379; 952 NW2d 402 (2020). This Court "must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract nugatory." *Id*. at 380. Words should be given their plain and ordinary meanings. *Lakeside Retreats*, 340 Mich App at 89. Further, contractual language should be read in its grammatical context. *Thiel v Goyings*, 504 Mich 484, 499; 939 NW2d 152 (2019). "Courts seek to find a fair reading of contract language—not a strict one—because strict constructionism destabilizes the whole enterprise of contract law." *Id*. at 500. The contractual provision at issue in this case provides:

> The prevailing party in any legal proceedings commenced to enforce this instrument, whether by arbitration or judicially, shall be entitled to an award of its costs including, but not limited to, reasonable attorneys' fees in addition to such other damages, if any, or other awards as may be appropriate.

The decisive question before us is whether the bankruptcy proceedings were "any legal proceedings commenced to enforce this instrument." Although Krebs argues that the bankruptcy proceedings were "any proceedings" and that they may have been part of other damages, his reading takes the contractual language out of its grammatical context. As the Michigan Supreme Court has stated, "Grammar helps." *Thiel*, 504 Mich at 499. The noun phrase "any legal proceedings" is modified by the adjectival phrase "commenced to enforce this instrument," which immediately follows it. The natural reading of these terms is that the legal proceedings for which a party is entitled to seek attorney fees are therefore constrained to only those proceedings that were commenced to enforce the employment agreement. Notably, the contractual language does not state that the prevailing party is entitled to attorney fees for proceedings that are "caused by," that "relate to," or that "result from" enforcement of the instrument. The only proceedings that were *commenced* to enforce the employment agreement were the complaint and counterclaim. The bankruptcy action, though related, was commenced for other purposes.

Therefore, the trial court properly denied Krebs's request for attorney fees arising from the bankruptcy proceedings.

C. MOTION TO REINSTATE

GLEI argues that the trial court, on the basis of Assignment 3, should have reinstated the judgment in its favor that this Court overturned in a previous appeal. The trial court did not err by refusing to exceed the scope of this Court's remand order.

The "rule of mandate" "embodies the well-accepted principle in our jurisprudence that a lower court must strictly comply with, and may not exceed the scope of, a remand order." *Int'l Business Machines, Corp v Dep't of Treasury*, 316 Mich App 346, 352; 891 NW2d 880 (2016).

> The rule of mandate is similar to, but broader than, the law of the case doctrine. The rule provides that any [trial] court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it. The [trial] court may, however, decide anything not foreclosed by the

> mandate. But the [trial] court commits "jurisdictional error" if it takes actions that contradict the mandate. [*Id*. (quotation marks and citation omitted).]

In this case, this Court had ordered the trial court to grant summary disposition in favor of Krebs. *Krebs II*, unpub op at 5. The only issue remaining was Krebs's postjudgment motion for attorney fees. See *Krebs III*, unpub op at 3. This Court remanded with the instruction that, "on remand, the trial court is to determine whether plaintiff is a successor to GLE's liabilities under the employment contract and whether plaintiff is liable for defendant's attorney fees under Section 18 of that contract." *Id*. at 6. After this Court had ordered the trial court to grant summary disposition to Krebs and remanded solely for the court to consider issues of successor liability and attorney fees, the trial court did not have the power to reopen the initial case and reenter summary disposition in favor of GLEI.[5]

III. CONCLUSION

The trial court's decision to reduce the award of attorney fees to $0 is reversed. This case is remanded for additional proceedings consistent with this opinion. On remand, the trial court shall reinstate the award of $227,273.48 plus additional reasonable attorney fees accrued during the course of this appeal. In all other respects the trial court's order is affirmed. We do not retain jurisdiction. Krebs, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Noah P. Hood
/s/ Allie Greenleaf Maldonado

[5] Regardless, we agree with Krebs and the trial court that GLEI created any error. A party may not appeal an error that the party created. *Clohset v No Name Corp*, 302 Mich App 550, 555; 840 NW2d 375 (2013). Any "mistake" that this Court made occurred because GLEI failed to produce Assignment 3 until after judgment had been granted in favor of Krebs. Had GLEI produced this assignment when it produced the two blanket assignments, it would have been available for this Court's initial review. To the extent that there was any error in this Court's previous opinion, that error was caused by GLEI, and GLEI is not entitled to relief.

STATE OF MICHIGAN

COURT OF APPEALS

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Before: HOOD, P.J., and LETICA and MALDONADO, JJ.

LETICA, J. (*concurring in part, dissenting in part*).

I would affirm in full the circuit court's well-reasoned and thorough orders. I accept the factual background set forth by the majority and agree with its analysis with the exception of part II.B.4. In my view, neither the law-of-the-case doctrine nor the rule of mandate prevented the trial court from considering and relying on the direct assignment of Dr. David Krebs's agreement from Great Lakes Eye, PC ("GLE") to Great Lakes Eye Institute, PC ("GLEI") ("Assignment 3") as a relevant factor to support reducing Dr. Krebs's attorney-fee award to $0.[1] Consequently, the trial court did not abuse its discretion in awarding that amount. See *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

Following an evidentiary hearing, the trial court determined that, although the specified factors in *Pirgu* did not require an adjustment in the amount of attorney fees owed, it was appropriate to consider Assignment 3 as an additional relevant factor, *id*. at 281. The court stated that Dr. Krebs had asserted that his employment agreement had not been effectively assigned to GLEI, and he had prevailed on the basis of that argument, but he had in fact signed a written

[1] Although the majority discusses the rule of mandate as to GLEI's argument that the trial court should have reinstated judgment in its favor, part II.C., it does not address Dr. Krebs's contention that the rule of mandate applies because it accepts his argument that the law-of-the-case doctrine affords him relief.

assignment. The court questioned how it could award Dr. Krebs attorney fees as a prevailing party when he had prevailed on "a false premise," since he had actual or constructive knowledge that he had signed the agreement. The court determined that the factor "wholly displace[d] considerations otherwise favoring an award." Because the trial court justified its use and consideration of Assignment 3, in my view, it was entitled to rely on Assignment 3 as a factor to support reducing Dr. Krebs's attorney-fee award. *Id*.

To the extent that Dr. Krebs argues that it was unfair to allow GLEI to produce a questionable document at such a late stage in the proceedings, I disagree. Dr. Krebs's fairness argument implicates his right to due process of law. The essential purpose of due process is to ensure fundamental fairness. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). The purpose of an evidentiary hearing is to assist the court in making an informed decision about a factually disputed issue. See *Parks v Parks*, 304 Mich App 232, 240; 850 NW2d 595 (2014).

In this case, Assignment 3 was admitted at the hearing on GLEI's successor liability. The attorney who represented Dr. Farhad Shokoohi and his business entities testified that he had prepared Assignment 3. Dr. Krebs also testified about Assignment 3 at the hearing, and he agreed that he had previously stated that the document contained his signature. He stated that he did not remembered signing it. The trial court was permitted to hold an evidentiary hearing to admit and consider this evidence, and doing so was not unfair when Dr. Krebs had the opportunity to cross-examine the preparer of the document, challenge its authenticity, and offer testimony about it at the hearing.

Dr. Krebs briefly argues that GLEI waived any reliance on Assignment 3 because it could have produced the document earlier in the case. A waiver is a voluntary, intentional abandonment of a known right. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). A contractual provision is waived when a course of conduct provides clear and convincing evidence that the "contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms . . . ." *Id*. There is no indication that GLEI voluntarily or intentionally abandoned an argument that Dr. Krebs's employment agreement had been validly assigned to GLEI. To the contrary, GLEI repeatedly attempted to argue that Dr. Krebs was bound by his employment agreement although GLEI relied on the blanket assignments ("Assignment 1" and "Assignment 2") to do so. *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2015 (Docket No. 320086) (*Krebs II*), pp 2-3. GLEI did not waive this argument.

Dr. Krebs further argues that the law-of-the-case doctrine or the rule of mandate barred the trial court from considering Assignment 3 because doing so would be contrary to this Court's previous determination that his employment agreement had not been assigned. Unlike the majority, I conclude that these arguments lack merit because none of this Court's previous opinions considered issues regarding Assignment 3 or attorney fees, and this Court expressly ordered the trial court to determine GLEI's liability for fees under the employment agreement.

The law-of-the-case doctrine and rule of mandate are distinct. *Int'l Business Machines Corp v Dep't of Treasury*, 316 Mich App 346, 352; 891 NW2d 880 (2016). The law-of-the-case doctrine provides that, if this Court has ruled on a particular issue, this Court generally will not

decide an issue differently during a subsequent appeal in the same case. *Id*. at 351. "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Lenawee Co v Wagley*, 301 Mich App 134, 150; 836 NW2d 193 (2013) (quotation marks and citation omitted). But this doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Admin v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). And our Supreme Court recently explained:

> The law-of-the-case doctrine " 'merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power*.' " *Locricchio* [*v Evening News Ass'n*], 438 Mich [84,] 109[; 476 NW2d 112 (1991)] (emphasis added), quoting *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912). We also heed the United States Supreme Court's astute observation that the "doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Pepper v United States*, 562 US 476, 506-507; 131 S Ct 1229; 179 L Ed 2d 196 (2011) (quotation marks, citations, and brackets omitted). [*Rott v Rott*, 508 Mich 274, 287-288; 972 NW2d 789 (2021).]

In contrast, under the rule of mandate, "a lower court must strictly comply with, and may not exceed the scope of, a remand order." *Int'l Business Machines Corp*, 316 Mich App at 352. After being ordered to issue judgment in favor of a party, the trial court may not allow renewed litigation. *Id*. Unlike the law-of-the-case doctrine, the rule of mandate is not discretionary and limits the power of the lower court. *Id*. at 353.

Beginning with the law-of-the-case doctrine, this Court's previous holdings did not address whether Dr. Krebs's employment agreement could have been or was in fact directly assigned from GLE to GLEI. This Court considered that an assignment of Dr. Krebs's employment to Dr. Shokoohi as an individual would have breached the language of the employment agreement, which provided that the agreement could not be assigned, "other than to P.C., limited liability company or partnership, or general partnership in which Farhad Shokoohi is the controlling shareholder, member or partner, respectively." *Krebs II*, unpub op at 2. Therefore, this Court concluded the blanket assignment of assets from GLE to Dr. Shokoohi (Assignment 1), and the blanket assignment of assets from Dr. Shokoohi to GLEI (Assignment 2), could not have assigned Dr. Krebs's employment agreement to GLEI because the contract had not been assigned to one of the specified types of business entities. *Id*. at 3. Further, Dr. Krebs's employment agreement had not been an "asset" for the purposes of the blanket assignments. *Id*. at 4. Also see *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued January 1, 2018 (Docket No. 335405) (*Krebs III*), pp 3-4 (explaining the holdings in *Krebs II*). This Court did not actually decide that Dr. Krebs's contract had never in fact been assigned to GLEI, it simply decided that the blanket assignments were not effective to assign his contract. Further, any questions concerning Assignment 3 could not have been implicitly or explicitly decided in the previous appeal because Assignment 3 did not surface until the evidentiary hearings after remand. Consequently, the law-of-the-case doctrine did not bar the court from considering Assignment 3.

Regarding the rule of mandate, Dr. Krebs argues that the trial court's decision exceeded the scope of this Court's remand order. In this case, this Court expressly ordered the trial court to determine "whether plaintiff is liable for defendant's attorney fees under Section 18 of that contract." *Krebs III*, unpub op at 6. Again, the purpose of an evidentiary hearing was to help the trial court determine disputed factual issues. *Parks*, 304 Mich App at 240. The trial court did not exceed the scope of this Court's remand order by holding an evidentiary hearing to help it determine whether GLEI was liable for Dr. Krebs's attorney fees, and for the reasons previously discussed, the trial court did not err by considering Assignment 3 when doing so.

Dr. Krebs next argues that Assignment 3 could not have assigned his employment agreement to GLEI in 2000 because that company did not exist until 2001. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). Dr. Krebs has abandoned this argument by failing to support it. GLEI was an assumed name of Shokoohi Eye Center, PC ("SEC"), as of December 1999, and Dr. Krebs's employment agreement was assigned to GLEI in 2000, but SEC simply did not amend its articles of incorporation to officially change the corporate name to GLEI until 2001. Dr. Krebs has provided no authority addressing whether an assignment to a company under an assumed name can be effective, and I decline to attempt to discover or rationalize the basis for this claim. *Id*.

Next, Dr. Krebs argues that, regardless of the assignment, GLEI would not have been able to assert a breach-of-contract claim against him because GLEI first breached the contract by failing to offer him an ownership opportunity. This Court has previously decided that Dr. Krebs failed to counterclaim that he had not been given the option to purchase stock in GLEI and held that, "[b]ecause there was no first breach of the employment agreement by [GLEI], Shokoohi's alleged sexual relationships with members of [GLEI's] staff is not relevant to any issue in the case." *Great Lakes Eye Institute, PC v Krebs*, unpublished per curiam opinion of the Court of Appeals, issued February 1, 2011 (Docket Nos. 294627 and 294628) (*Krebs I*), p 3. Whether GLEI first breached the employment agreement has been explicitly decided in a previous opinion and I will not revisit it.

Finally, Dr. Krebs argues that the trial court had discretion to determine the amount of reasonable attorney fees, but that it did not have the discretion to reduce that award to $0 when he was contractually entitled to a recovery. I conclude that the trial court's decision to adjust the attorney-fee award to $0 fell within the range of reasonable and principled outcomes on the basis that Dr. Krebs was the prevailing party only because of the false premise that his employment agreement had not been assigned from GLE to GLEI. As already discussed, after determining a baseline figure for reasonable attorney fees, a trial court may then adjust that figure up or down by considering eight specific factors and any additional relevant factors. *Pirgu*, 499 Mich at 281. If the trial court considers additional factors, it should "justify the relevance and use of any additional factors." *Id*. at 282. Typically, the purpose of fee-shifting provisions is to deter protracted litigation. See *Smith v Khouri*, 481 Mich 519, 528; 751 NW2d 472 (2008) (discussing the fee-shifting provisions for rejecting case evaluation). Regardless, the usual purpose of fee-shifting provisions is not to produce windfalls. *Id*. And courts generally disfavor granting undeserved windfalls. See e.g., *Wilmore-Moody v Zakir*, 511 Mich 76, 88; 999 NW2d 1 (2023) (concerning an automobile insurance contract).

At the time of the trial court's decision, the parties had engaged in more than 10 years of litigation regarding whether Dr. Krebs's employment agreement had been assigned to GLEI. Dr. Krebs based his defense on the technical lack of an assignment, arguing that this had relieved him of any obligations or liabilities under that contract, *Krebs II*, unpub op at 2, and summary disposition was granted in his favor on that basis, *id*. at 6. Although GLEI produced Assignment 3 well after the liability phase of the proceedings had been resolved, Dr. Krebs agreed that the signature on the document was his signature. Although Dr. Krebs presented evidence that he had not remembered the assignment, this Court generally defers to the trial court's superior ability to assess a witness's credibility. *Smith v Straughn*, 331 Mich App 209, 217; 952 NW2d 521 (2020). Indeed, "the law is clear that one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement." *Bakeman v Citizens Ins Co of the Midwest*, 344 Mich App 66, 76; 998 NW2d 743 (2022) (quotation marks and citation omitted).

The trial court's consideration of an additional relevant factor was clearly stated and justified. The trial court did not hold that Dr. Krebs was not entitled to contractual attorney fees; it held that he was entitled to fees, but that the reasonable amount of fees was $0. Although adjusting an attorney-fee award from a baseline figure of $227,273.48 to $0 is extreme, under the specific facts of this case, this was not an unreasonable result in order to avoid an unjust windfall to Dr. Krebs.[2]

/s/ Anica Letica

[2] In light of my conclusion, it is unnecessary to determine whether Dr. Krebs's bankruptcy fees should have been included in his award. Regardless, I agree with the majority that the trial court properly denied Krebs's request for attorney fees arising from the bankruptcy proceedings.